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2020 Report of the Ombudsman for Property Rights

The Office of the Ombudsman for Property Rights, created in 2006 by House Bill 1944 and located within the Office of the Public Counsel, is tasked with assisting “citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures.” Mo. Rev. Stat § 523.277 (2006). Section 523.277, RSMo, also requires the Ombudsman to document the use of eminent domain within the State, along with any issues associated with its use, and submit that information in an annual report to the General Assembly on January 1 of each year.

Missouri property owners contacted the Ombudsman over 40 times in 2020, resulting in more than 95 hours spent reviewing a wide variety of eminent domain questions. Guidance typically provided by the Ombudsman generally includes, but is not limited to, the following issues:

- Statutory provisions, case law, rules of civil procedure, constitutional provisions, and other legal authority concerning the topic of condemnation;
- The jurisdictional limitations of our office including that we do not have the power to represent individuals in condemnation proceedings, even in situations where the cost to litigate preclude access to justice;
- The procedural timeframe involved in the condemnation of property;
- The valuation of property subject to condemnation;
- The valuation of a partial taking as compared to the valuation of a full taking;
- The requirement of a condemning authority to negotiate with property owners in good faith prior to filing a petition for a condemnation order;
- The significance of Sections 394.080 and 394.085, RSMo, regarding electric cooperatives and broadband communications;
- The legal authority to bring a private lawsuit when an entity caused damages to a property owner through trespass or inverse condemnation or refusal to follow Chapter 523;
- The heritage value of property taken by eminent domain; and
- The process of selecting the commissioners in a condemnation proceeding.

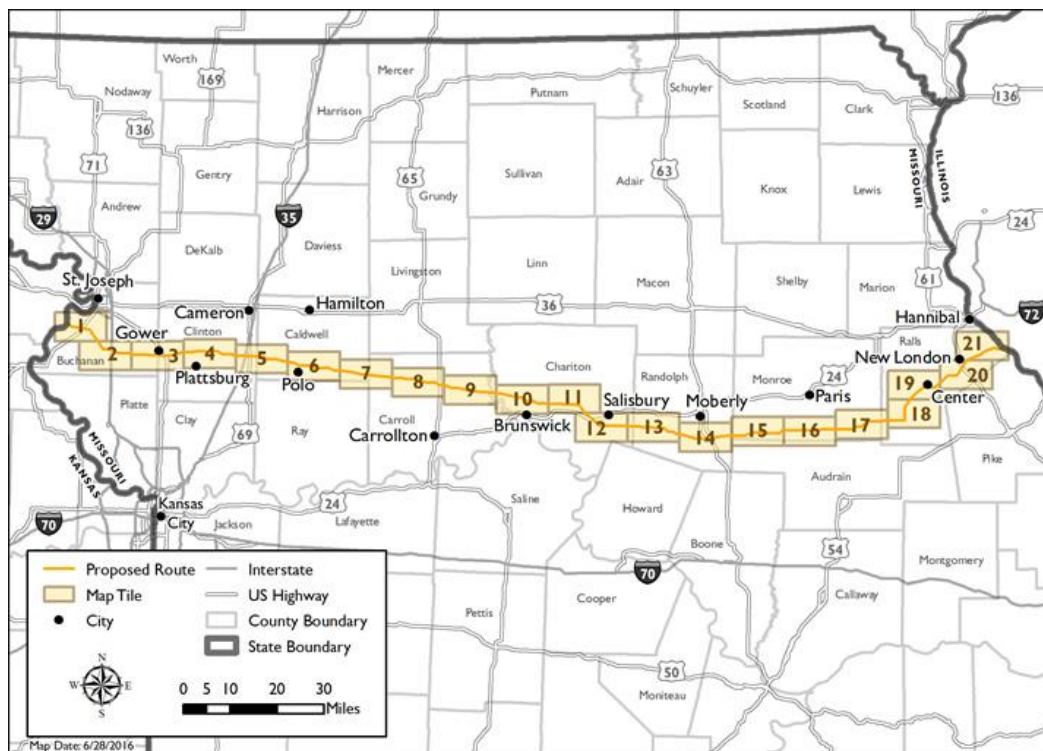
The data below includes summaries of specific projects involving eminent domain and summaries of relevant Missouri and Federal case law regarding eminent domain.

A. Status of Missouri Projects Involving Eminent Domain in 2020.

1. Grain Belt Express

The Grain Belt Express Clean Line is a \$2.35 billion proposed construction project for approximately 780-miles of overhead, direct current transmission line that would deliver wind energy from western Kansas to various utilities in Missouri, Illinois, Indiana, and other neighboring states. The project is designed to convey roughly 4,000 megawatts of energy, of which 500 megawatts would be eligible for utilization in Missouri and the remaining 3,500 megawatts delivered to the states further east. The Missouri portion of the project would cover nearly 206 miles across northern Missouri and would affect the following counties: Buchanan, Clinton,

Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls. Grain Belt's proposed route is as follows:



In 2015, the Missouri Public Service Commission (Commission) denied the request for a certificate of convenience and necessity (CCN) authorizing Grain Belt Express Clean Line, LLC (Grain Belt) to construct the proposed transmission line. (Case No. EA-2014-0207). The Commission reached this decision based on its conclusion that Grain Belt failed to satisfy its burden to demonstrate that the project was necessary or convenient for the public.

In 2016, Grain Belt filed a second application with the Commission requesting approval of the project (Case No. EA-2016-0358). Grain Belt offered updated information in the newer filing to claim it had entered into a transmission service agreement with the Missouri Joint Municipal Electric Utility Commission, which agreed to purchase 225 megawatts of capacity for the project. The Commission entered a report and order again denying Grain Belt's CCN request on August 16, 2017. The Commission denied Grain Belt its certificate because Grain Belt failed to establish that it had obtained county assents from each county affected by the project before approval.

Grain Belt appealed the 2017 order to the Missouri Court of Appeals for the Eastern District. (ED105932). On review, the Eastern District observed that the statutory language requiring utilities to seek a certificate of convenience and necessity from the Commission recognized two distinct types of certificates: line certificates and area certificates. The Eastern District then concluded that a prior Western Appellate District opinion was incorrect, and consequentially that a utility seeking only a line certificate was under no obligation to seek county assent. The Eastern District consequently reversed the Commission's decision.

The Commission later approved Grain Belt's certificate application on March 20, 2019. The Missouri Farm Bureau appealed the Commission's latest decision to the Western District Court of Appeals (WD82842), while the Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners (Show Me Concerned Landowners) and Christina Reichert appealed to the Eastern District Court of Appeals (ED107886). The Eastern District consolidated the appeals, and affirmed the Commission's order on December 17, 2019.

At the time of last year's Ombudsman Report, a related but separate appeal was still pending. The Western Appellate Court has since made its decision. Invenergy Transmission LLC (Invenergy) and Grain Belt jointly filed an application for the Commission to approve the sale of Grain Belt to Invenergy on February 1, 2019. (Case No. EM-2019-0150). The Commission approved the transaction on June 5, 2019. The Show Me Concerned Landowners, and Joseph and Rose Kroner appealed the Commission's decision to Missouri's Western Appellate Court (WD83236; 604 S.W.3d 634 (Mo. App. W.D. 2020)). The Western Appellate Court ruled on July 7, 2020, that the Commission had the jurisdictional authority to approve the sale, and that Grain Belt qualifies as an "electrical corporation" for Commission regulatory purposes.

On September 2, 2020, Missouri landowners impacted by the project ("Landowners") filed a complaint with the Commission against Grain Belt Express LLC and Invenergy Transmission LLC ("Respondents"), alleging a violation of the Commission's order granting the certificate to construct the transmission line (Case No. EC-2021-0059). The Landowners assert the Respondents made changes to the project that are materially different from the project approved by the Commission, and, therefore, do not have a valid certificate to construct the transmission line or

valid eminent domain authority. The parties to the case filed legal briefs in October 2020, and the Commission directed additional briefing due January 7 and 14, 2021.

2. Limestone Ridge Project

Ameren Transmission Company of Illinois (ATXI) proposes to construct a 12 to 19 mile 138kV transmission line to connect two substations in Perry and Cape Girardeau counties. Eminent domain authority would be necessary for the 125-foot wide right-of-way necessary for the line, which ATXI proposes to mount on 160-foot tall steel poles. ATXI is partnered with the Citizens Electric Cooperative (“CEC”) and the Wabash Valley Power Alliance (“WVPA”) for the project. WVPA, based in

Indiana, provides generation and transmission services to CEC, and owns the existing transmission crossing over the Mississippi River. ATXI states the purpose of the project is to improve energy reliability for the area. The proposed in-service date is December 2023.

On September 25, 2020, ATXI filed a “Notice of Intended Case Filing” with the Missouri Public Service Commission (“Commission”) indicating its “intent to file an application for authority to construct, install, own, operate, maintain, and otherwise control and manage” the new line and substations (Case No. EA-2021-0087). Although ATXI has not filed the application, some residents in the area have already indicated opposition to the project. The City of Frohna in Perry County and several landowners submitted comments to the Commission objecting to the project, however, the Commission has not formally sought comments.



B. Eminent Domain Cases in Missouri Appellate Courts in 2020.

1. *Land Clearance for Redevelopment Authority v. Osher*, 604 S.W.3d 827 (Mo. App. E.D. 2020)

This case arose out of the Land Clearance for Redevelopment Authority's ("LCRA") condemnation of the Buster Brown Building, former home of the Buster Brown Shoe Company, in St. Louis. The LCRA sought the property, and over 500 other properties, for the new National Geospatial-Intelligence Agency facility. The landowner, James Townsend Osher ("Landowner") appealed the trial court's judgment awarding him \$573,000 as compensation for LCRA condemning his property.

This opinion could influence future decisions that assess litigation costs on the opposing party in condemnation litigation. Missouri Supreme Court Rule 86.09 states "the cost of the condemnation proceeding shall be paid by the condemner," but in subsequent litigation, the rule grants the court discretion to assess costs that "may be deemed just." Landowner argued LCRA did not provide justification for assessing its costs on him, but the Court held that LCRA had no duty under Rule 86.09 to justify the circuit court's award of costs. This decision affirms the circuit court has significant discretion to award costs without a party justifying having their costs assessed on the opposing party.

C. 2019 Eminent Domain/Condemnation Data From State Courts Administrator

Eminent Domain Case Filings from 01/01/2020 to 12/10/2020			
County	Eminent Domain by the State in Circuit Court	Eminent Domain by Other Entity in Circuit Court	Grand Total
Barry County	1		1
Callaway County		4	4
City of St Louis	1		1
Clay County	2	1	3
Cole County		1	1

Dunklin County		1	1
Greene County		1	1
Jackson County	3	3	6
Jefferson County		2	2
Knox County		1	1
Lewis County		2	2
Marion County		1	1
Newton County		2	2
Platte County		1	1
St. Charles County		2	2
St. Louis County	8	28	36
Taney County		1	1
Texas County	1		1
Grand Total	16	51	67

Condemnation Dispositions from 01/01/2020 to 12/10/2020		
County & Disposition	Circuit Court Eminent Domain Initiated by Other Entity	Circuit Court Eminent Domain Initiated by State
Barry County	0	1
Dismissed by Parties	0	1
Callaway County	3	0
Dismissed by Parties	3	0
City of St Louis	3	0
Dismissed by Parties	2	0
Other Final Disposition	1	0
Clay County	2	1
Dismissed by Parties	2	0
Tried at Court	0	1
Cole County	1	0
Dismissed by Parties	1	0
Dunklin County	1	0

Other Final Disposition	1	0
Greene County	0	1
Dismissed by Parties	0	1
Jackson County	2	2
Dismissed by Parties	0	1
Other Final Disposition	1	1
Dismissed by Court with Prejudice	1	0
Jefferson County	1	0
Other Final Disposition	1	0
Lewis County	1	0
Dismissed by Parties	1	0
Marion County	1	0
Dismissed by Parties	1	0
Phelps County	1	0
Consent Judgment	1	0
Ray County	1	0
Dismissed by Parties	1	0
St. Charles County	7	1
Dismiss by Ct w/o Prejudice	1	0
Dismissed by Parties	2	0
Other Final Disposition	3	0
Tried by Court- Civil	1	1
St. Louis County	12	1
Dismissed by Parties	8	0
Tried by Court-Civil	1	0
Other Final Disposition	2	1
Uncontested	1	0
Taney County	2	0

Other Final Disposition	1	0
Tried by Court - Civil	1	0
Texas County	0	1
Consent Judgment	0	1
Grand Total	38	9

E. Department of Transportation Data

The Missouri Department of Transportation acquired 557 parcels of real property for state projects in Calendar Year 2020 to date.¹ 487 were resolved by negotiation, 68 were donated to the Department, and 2 required a condemnation lawsuit. Property owner satisfaction rating, overall, for CY 2020 to date was a 4.51 out of 5.²

F. Conclusion

There were noticeably less eminent domain proceedings in Missouri's courts and appellate activity than previous years. The Office of the Public Counsel suspects this downtrend in activity is due to the COVID-19 pandemic that arrested most people's activities in 2020. Nonetheless, our office still received frequent calls and letters regarding eminent domain takings initiated by authorized entities and local governments. Missouri citizens routinely express frustration that they cannot forestall an eminent domain project so long as the condemnation complies with state law. Most affected property owners also either lack the financial resources to retain private counsel to challenge an eminent domain taking, or are disputing a taking so financially small that retaining private counsel is not cost-effective.

For questions or concerns about this report, please contact Marc Poston, Public Counsel, at (573) 751-4857.

¹ Data taken December 9, 2020.

² As compared to a 4.64 in 2019, 4.83 in 2018, 4.80 in 2017, 4.63 in 2016, 4.7 in 2015, 4.47 in 2014, 4.8 in 2013, 4.6 in 2012, and 4.8 in 2011.

Respectfully Submitted,

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